Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM 1978

NO. 78-1309

PIOCHE MINES CONSOLIDATED, INC.,
Petitioner

v.

FIDELITY PHILADELPHIA TRUST COMPANY,
Respondent

OPPOSITION TO PETITION FOR COMMON LAW WRIT OF CERTIORARI OR WRIT OF MANDAMUS

To the United States Court of Appeals for the Ninth Circuit

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To the Honorable Warren E. Burger, Chief Justice of the United States, and to the Honorable, the Associate Justices of the United States Supreme Court:

FIDELITY PHILADELPHIA TRUST COMPANY, Respondent herein, by WILLARD P. NORBERG and RICHARD P. BROWN, its attorneys, respectfully submit this opposition to the petition for writ of certiorari or writ of mandamus heretofore filed on behalf of PIOCHE MINES CONSOLIDATED, INC. to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, reported at 587 F.2d 27 (1978).

OPINION BELOW

The opinion of the Court of Appeals, and its order denying a rehearing, are correctly set forth in Appendix B of the petition. Petitioner asserts that no opinion was rendered by the United States District Court for the District of Nevada, yet fails to note that a detailed ruling, with factual findings, was issued by the United States Magistrate, to whom the matter had been referred by written consent of the parties. The Magistrate's ruling, dated June 18, 1976, which was accepted by the District Court as its final order, is attached as Appendix A hereto.

JURISDICTION

Respondent accepts the statement of the Court's jurisdiction set forth in the petition.

QUESTIONS PRESENTED

Petitioner asserts, as an initial question, the issue of whether the Court of Appeals "abused its discretion in affirming a judgment of the United States District Court for the District of Nevada" which dismissed, for want of prosecution, a counterclaim that had been pending for over 20 years. Such assertion is, of course, patently erroneous; the only question is whether the District Court abused its discretion in ordering the dismissal in accord with appropriate findings and substantial evidence. *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639, 642, 96 S.Ct. 2778, 2780 (1976).

The additional questions purportedly raised, asserting constitutional issues and alleged misuse of process were not raised below and were presumably added to infuse some

semblance of legal import into a purely factual dispute having significance only to the immediate parties.

CONSTITUTIONAL PROVISIONS INVOLVED

Contrary to the assertion of the petition, there are no constitutional provisions involved.

STATEMENT OF THE CASE

The petition relates to a counterclaim by Pioche Mines Consolidated (hereinafter referred to as "Pioche") against Fidelity Philadelphia Trust Company (hereinafter referred to as "Fidelity") which was originally filed in 1940. Its final version, referred to as the Second Amended Supplemental Counterclaim, with allegations encompassing the period from 1925 to 1955, was at issue by early 1956. An initial motion by Fidelity to dismiss this counterclaim for lack of prosecution was denied in 1961. In view of the continued failure to bring the matter to trial, a second motion to dismiss was filed in June 1974 and, by order of the District Court, was referred to U. S. Magistrate Joseph L. Ward.

Counsel for both parties filed written consent to a determination of the motion by the Magistrate and agreed to accept the Magistrate's ruling as a final decision of the District Court, subject to the right to file objections as provided by local rules. After a lengthy hearing and voluminous briefing, the Magistrate, on June 18, 1976, filed his formal ruling granting the motion to dismiss the counterclaim for want of prosecution. The factual findings in support of the ruling include lack of diligence in bringing the counterclaim to trial without a showing of sufficient

excuse or justification, lack of evidence to show an intent to reactivate or prosecute the counterclaim until long after filing of motion to dismiss, and the substantial prejudice suffered by Fidelity because of the delay.

Objections to this ruling were overruled by the District Court and judgment was entered dismissing the counterclaim. This judgment was affirmed by unanimous decision of the Court of Appeals for the Ninth Circuit, which agreed that there was no excuse for at least the last five or six years of inactivity and that, accordingly, there was no abuse of discretion by the trial court in dismissing the counterclaim.

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. The facts of this case are unique, unlikely to recur, and have no importance sufficient to warrant this Court's attention.

Even if it be assumed that the circumstances set forth in the petition, recited without even a minimal attempt to indicate any substantiation in the record below, bear any relationship to the relevant and material evidence, it is apparent that this is a unique case, involving factual and procedural aspects that would never arise again. The exercise of discretion by a trial court, in this instance to dismiss a claim pending for over twenty years, is not a matter that merits the attention and time of this Court. The inclusion of alleged constitutional issues indicates that petitioner is aware that a mere factual attack on the exercise of discretion by the trial court is not a sufficient basis to warrant grant of certiorari.

2. A review by this Court would involve only questions of evidence which have already been decided, adversely to petitioner, by a U.S. Magistrate and four judges below.

U.S. Magistrate Ward, District Judge Roger Foley, Jr., District Judge Muecke sitting by designation with the Circuit Court, and Circuit Judges Barnes and Goodwin reviewed the evidence presented in support of and in opposition to the motion to dismiss the counterclaim for want of prosecution. All agreed that substantial evidence warranted the dismissal and rejected contrary arguments presented by petitioner. All that is really involved in the petition is an attempt to obtain one more factual review of the voluminous procedural record below, extending back to 1940. There is no justification for further review of this evidentiary morass.

3. The decision below gave full consideration to the issues and decided them correctly in accord with controlling rules governing the exercise of discretion under the factual circumstances presented.

The opinion below evidences a careful consideration of the record in the trial court and of the contentions advanced by petitioner in its unsuccessful attempt to excuse its patent failure to prosecute the counterclaim in a reasonably diligent manner. In holding that there was no abuse of the discretion accorded to a trial court under the circumstances presented, the Court of Appeals relied on well established and controlling legal precedents in the Ninth Circuit. These legal precedents are fully in accord with the guidelines set forth by this Court in similar cases. See, e.g., *Link v. Wabash R.R.*, 370 U.S. 626, 82 S.Ct. 1386

(1962) and *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 96 S.Ct. 2778 (1976).

CONCLUSION

The counterclaim involved herein was originally filed in 1940 and was at issue, in an amended form, as early as 1956. The trial court made specific findings, supported by substantial evidence, of lack of diligence in prosecution for at least six years, with actual prejudice resulting to the counterclaim defendant. If dismissal of such a proceeding was not an appropriate exercise of discretion, it is difficult to envisage any set of facts that would permit a District Court to eliminate the deadwood from an overcrowded trial calendar. Any further consideration would be a waste of judicial time and effort. Certiorari, therefore, should be denied.

Dated: March 21, 1979.

Respectfully,

WILLARD P. NORBERG
Attorney for Respondent

(Appendix A Follows)

APPENDIX A

Appendix A

In the United States District Court
for the District of Nevada

Received and Filed
Jun 18, 10:39 AM 76
CAROL C. FITZGERALD
By ROCHELLE BICKEL
Deputy

Entered Jun 18 1976
Clerk, U.S. District Court
District of Nevada
By ROCHELLE BICKEL
Deputy
Civil #2

Fidelity-Philadelphia Trust Co., et al.,
Plaintiffs,

vs.

Pioche Mines Consolidated, Inc., et al.,
Defendants.

RULING BY THE MAGISTRATE ON THE MOTION TO DISMISS COUNTERCLAIM FOR WANT OF PROSECUTION

The motion of The Fidelity Bank to dismiss the defendant's counterclaim for want of prosecution having regularly come before me on November 7, 1975, all parties being represented by counsel, and extended oral and written argument having been presented, the following ruling is hereby made:

1. Defendant's Second Amended Supplemental Counterclaim, filed on June 30, 1955, incorporating by reference

certain claims set forth in a prior counterclaim filed in 1941, has been at issue since April 24, 1956 without having been brought to trial. Counterclaim-defendant filed this motion to dismiss for lack of prosecution in June 1974; the motion was originally granted by this Court's minute order dated October 15, 1974, but said order was subsequently set aside to permit counterclaimant to respond to the motion.

2. Although there were intervals during the period since 1956 in which there were substantial difficulties impeding prosecution of the counterclaim, there has been no real display of diligence during those periods of time, such as from 1969 to 1975, when this counterclaim could have been pursued; moreover, counterclaimant has not shown that it pursued other available avenues and devices that might have been employed to remove what it claims to be the delays that prevented it from pursuing the counterclaim.

3. During the period since May 7, 1969, the date of the Order by Judge Roger D. Foley directing the receiver to return the properties, books, files, records, and accounts of Pioche to its officers, the counterclaim could have been pursued and brought to trial. There was no display of diligence by the counterclaimant during this extended period of inactivity, and there has been no showing of legally sufficient excuse or justification for the failure to prosecute the counterclaim during these years.

4. The record indicates no action on the part of the counterclaimant or its counsel that would indicate an intent to reactivate or prosecute the counterclaim until January 1975, seven months after the filing of the motion to dismiss

and three months after the Court's minute order of October 25, 1974, initially granting the motion. Such inaction constitutes a clear failure, without sufficient excuse, to exercise that due diligence required in cases such as this where claims have been pending for many years.

5. Under the circumstances shown by the record, the counterclaim defendant has suffered substantial prejudice from the counterclaimant's failure diligently to prosecute the counterclaim.

RULING

For the reasons above stated, it is the ruling of the United States Magistrate that the motion to dismiss the second amended counterclaim for want of prosecution should be and is hereby granted.

DATED: June 18, 1976

JOSEPH L. WARD
Joseph L. Ward
United States Magistrate

Approved as to Form:
T. David Horton
Attorney for Counterclaimant
Willard P. Norberg
William K. Woodburn
Attorneys for Counterclaim-defendant

By WILLARD P. NORBERG
Willard P. Norberg

I hereby certify that on 7-18-76
I caused to be mailed to all counsel
of record in this action a true copy
of this document.
CAROL C. FITZGERALD, Clerk
By ROCHELLE BICKEL
Deputy